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Callie Coker
William & Mary Law School

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Million Dollar Bloggers Club: How the Copyright Act Fails the Blogging Phenomenon and a Proposal for More Effective Protection

MILLION DOLLAR BLOGGERS CLUB: HOW THE COPYRIGHT ACT FAILS THE BLOGGING PHENOMENON AND A PROPOSAL FOR MORE EFFECTIVE PROTECTION

*Callie Coker**

ABSTRACT

The evolution of social media encouraged a parallel evolution of blogging, sprouting a million-dollar industry that rivals magazines in content and influence. The rise of the blogging phenomenon created multiple niches for companies to grow, with new companies emerging to accommodate one of the largest business booms of the digital age. Despite the prevalence of the blogging industry, current copyright law does not accommodate bloggers effectively. While government agencies, such as the Federal Trade Commission (FTC), recognize the influence of bloggers, copyright protection for the blogging community remains inadequate. Cultivating a successful business in the digital age is difficult, but the blogging industry is an integral component to the digital business world and should be afforded greater copyright protection. However, there are several roadblocks bloggers experience in gaining effective protection for their creative content---namely, archaic registration methods with the U.S. Copyright Office and safe harbors under the Digital Millennium Copyright Act (DMCA) that complicate infringement enforcement. Working within the confines of the Copyright Act, this Article suggests that blogs can and should be registered with the U.S. Copyright Office as serial works and attempts to use the Act's existing language to accommodate the blogging industry. Further, this Article will use the FTC's guidelines for advertisement disclosures to argue that registration of a blog should also extend copyright protection to social media channels associated with the blog's brand.

* Juris Doctor Candidate, William & Mary Law School, Class of 2019. Bachelor of Arts in English from Saint Mary's College of California (2016). The author would like to thank her family for their continual support in her professional pursuits.

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INTRODUCTION

The blogging industry is sometimes reduced to frivolity or superficiality, but it has transformed the landscape of entrepreneurial successes in the digital age. In 2014, Elsie Larson, co-founder and creative director of the lifestyle blog, *A Beautiful Mess*, wrote the first installment in a series of posts about young industries.¹ In the post, Larson wrote, “I really believe that in our lifetime being ‘just’ a blogger will become a legitimate job in most people’s eyes. It’s happening.”² Larson’s successful blog business, *A Beautiful Mess*, which had its first million-dollar year in 2013, supports her observation.³ Sharing Larson’s sentiment, *Vanity Fair* published a 2014 piece focused on bloggers who generate high levels of income from their blogs.⁴ *Vanity Fair*’s article featured Rachel Parcell, of the blog *Pink Peonies*, who was expected to gross \$960,000 that year.⁵ Parcell also drove \$1 million in sales to Nordstrom—in online sales alone—in the 2014 holiday season.⁶ Today, blogging remains a viable career option for young entrepreneurs and previously established bloggers, such as Larson and Parcell, continue to grow in popularity.⁷ Due to their success, Larson and her sister, Emma Chapman, co-founder and CEO of *A Beautiful Mess*, have acquired two book deals,⁸ developed four apps,⁹ and established their own product line.¹⁰ Similarly,

¹ Elsie Larson, *On Young Industries (Part 1): Blogging*, A BEAUTIFUL MESS (Mar. 19, 2014), <https://abeautifulmess.com/2014/03/on-young-industries.html>.

² *Id.*

³ Emma Chapman, *On Changing Dreams*, A BEAUTIFUL MESS (Feb. 20, 2014), <https://abeautifulmess.com/2014/02/on-changing-dreams.html>.

⁴ See generally Priya Rao, *The Top Fashion Bloggers Making Millions Aren’t Who You Think*, VANITY FAIR HIVE (June 12, 2014, 1:19 PM), <https://www.vanityfair.com/news/daily-news/2014/06/fashion-bloggers-making-millions>.

⁵ *Id.*

⁶ Adele Chapin, *Pink Peonies Blogger Launches Her Own Clothing Line*, RACKED (Apr. 25, 2016, 12:00 PM), <https://www.racked.com/2016/4/25/11501880/rachel-parcell-pink-peonies-fashion-line>.

⁷ See Nicole Singh, *Celebrity vs. Blogger*, HARPER’S BAZAAR (Apr. 1, 2016, 8:36 PM), <https://www.harpersbazaar.com.au/fashion/bloggers-are-more-popular-than-celebrities-3569>; see also Amelia Diamond, *Joanna Goddard on Being One of the First “Mom Bloggers,”* MAN REPELLER (Dec. 7, 2017), <https://www.manrepeller.com/2017/12/cup-of-jo-founder-joanna-goddard-on-career-and-motherhood.html>.

⁸ See Emma Chapman, *Weekday Weekend Cookbook*, A BEAUTIFUL MESS, <https://abeautifulmess.com/weekday-weekend-cookbook>; see also A Beautiful Mess, *On Writing a Book (Part 1: Getting a Book Deal)*, A BEAUTIFUL MESS (July 18, 2013), <https://abeautifulmess.com/2013/07/on-writing-a-book.html>.

⁹ See A Color Story, *A Design Kit Is Now Available for IOS in the App Store!*, A BEAUTIFUL MESS (Jan. 26, 2018), <https://abeautifulmess.com/2018/01/a-design-kit-is-now-available-for-ios-in-the-app-store.html>; Elsie Larson, *Announcing Our New App: A Color Story*, A BEAUTIFUL MESS (Jan. 12, 2016), <https://abeautifulmess.com/2016/01/announcing-our-new-app-a-color-story.html>; A Beautiful Mess, *Party Party App*, A BEAUTIFUL MESS (July 17, 2014), <https://abeautifulmess.com/2014/07/party-party-app.html>; A Beautiful Mess, *A Beautiful Mess Photo App*, A BEAUTIFUL MESS (May 9, 2013), <https://abeautifulmess.com/2013/05/a-beautiful-mess-photo-app.html>.

¹⁰ See OUI FRESH, <https://ouifresh.com/> (last visited Jan. 23, 2018).

Parcell launched her own clothing line in 2016,¹¹ following other popular bloggers, like Emily Shuman of *Cupcakes and Cashmere*, who launched her blog's eponymous clothing line in 2015.¹²

Though the stigma Larson addressed—that bloggers just blog—remains, it is difficult to overlook blogging's influence.¹³ When people hear the term “blogger”, a certain image undoubtedly comes to mind. Typically, bloggers are seen as people with average writing skills, an expensive wardrobe, a massive social media following, and an affinity for coffee. Despite this stereotype, many bloggers challenge the way society thinks about the people behind the success.¹⁴ Further, blogging is no longer just blogging.¹⁵ Gone are the days of traditional, online, diary-like, blogs.¹⁶ Today, bloggers' websites resemble digital magazines and are carefully curated, well-branded businesses.¹⁷ Bloggers—like the companies that consistently use bloggers' influence to promote their own brands—employ social media influence as a vital component of business growth.¹⁸ Additionally, the blogging industry contributes to the economy in unexpected ways.¹⁹

When the connection between blogging, promotion, and social media grew, the regulation of bloggers who build their brands across various social media channels increased.²⁰ The Federal Trade Commission (FTC), for example, now requires disclosure of advertisements across social media channels.²¹ Yet bloggers receive copyright protection only for the individual posts they register, and protection does not extend to their social media channels.²² This is problematic because the website and social media channels are individual components to an umbrella brand and are, effectively, one business.²³

This Article will argue that blog copyright registration should be simplified, and protection should extend to the social media channels through which bloggers

¹¹ See Chapin, *supra* note 6.

¹² See Erika Adams, *Cupcakes and Cashmere's Clothing Line is Already Selling Out*, RACKED (July 6, 2015, 12:11 PM), <https://www.racked.com/2015/7/6/8900639/cupcakes-and-cashmere-nordstrom-shopbop>.

¹³ See Diamond, *supra* note 7 (illuminating how blogging evolved into an industry).

¹⁴ See, e.g., Heidi Potter, *Grace Wainwright of A Southern Drawl: FACES of Louisville*, STYLEBLUEPRINT, <https://styleblueprint.com/louisville/everyday/grace-wainwright-southern-drawl-faces-louisville/> (highlighting Grace Wainwright of *A Southern Drawl* as an example of a blogger who created a blog as a hobby after earning a master's degree in biomedical engineering).

¹⁵ See *infra* Part I.

¹⁶ See, e.g. Diamond, *supra* note 7.

¹⁷ See *id.*

¹⁸ See Singh, *supra* note 7.

¹⁹ See Elana Lyn Gross, *How The 26-Year-Old Founder of Pink Peonies Turned Her Blog Into A Million-Dollar Business*, FORBES (Nov. 3, 2017, 2:21 PM), <https://www.forbes.com/sites/elanagross/2017/11/03/how-the-26-year-old-founder-of-pink-peonies-turned-her-blog-into-a-million-dollar-business/#68ce14434cc3>.

²⁰ See *infra* Part II.

²¹ See *id.*

²² See *infra* Part III.

²³ See *id.*

establish their brands.²⁴ Part I will provide a breakdown of the blogger business and explain how the bloggers utilize social media to achieve business goals.²⁵ Part II will use the FTC guidelines for disclosure of advertisements to advocate for more fervent protection of bloggers' content.²⁶ Part III will discuss current copyright protections for bloggers and suggest that blogs should be registered as serial works.²⁷ Finally, Part IV will discuss the Digital Millennium Copyright Act (DMCA) safe harbors for social media sites and how such treatment impacts the blogging industry.²⁸

I. A BLOGGER'S BUSINESS MODEL: BUILDING A BRAND THROUGH SOCIAL MEDIA CHANNELS

Effectively safeguarding the intellectual property rights of bloggers' creative content is imperative to the success of their businesses. Thus, this Article will first break down the blogger business model, exploring the various ways in which content is produced and used. A lifestyle blog is a website where its author shares her everyday life and interests.²⁹ Typically run by a single author, a blog's content is often "highly personalized" to the author's experience, locale, and stage of life.³⁰ The content of a lifestyle blog typically includes multiple topics³¹—similar to magazines,³² which include topics such as lifestyle, fashion, beauty, food, et cetera—because bloggers curate their blogs based on their individual interests.³³ Unlike magazines, however, blogs are viewed as more personal because the readers connect with an individual blog author and readers follow the author's story.³⁴ The personal nature of blogs is what originally attracted readers to the blogging community.³⁵ However, as blogging gained popularity, the number of

²⁴ See *infra* Part I, II, III.

²⁵ See *infra* Part I.

²⁶ See *infra* Part II.

²⁷ See *infra* Part III.

²⁸ See *id.*

²⁹ See Mediakix Team, *What is a Lifestyle Blogger?*, MEDIKIX (June 5, 2015), <http://mediakix.com/2015/06/what-is-a-lifestyle-blogger/#gs.gnUbHqQ>.

³⁰ See *id.*

³¹ See, e.g., GAL MEETS GLAM, <http://galmeetsglam.com/> (last visited Feb. 25, 2018) (featuring topics such as style, travel, and beauty); CARLY THE PREPSTER, <http://www.carlytheprepster.com/> (last visited Feb. 25, 2018) (featuring topics such as style, travel, inspiration, lifestyle, and college).

³² See, e.g., MARIE CLAIRE, <http://www.marieclaire.com/> (last visited Jan. 25, 2018) (covering fashion, beauty, celebrity, politics, and love).

³³ See Monica Beatrice Welburn, *Thoughts on Lifestyle Blogging & Finding Your 'Blend' of Content*, THE ELGIN AVENUE (Feb. 6, 2017), <http://www.theelginavenue.com/2017/02/thoughts-on-lifestyle-blogging-finding-your-blend-of-content.html>.

³⁴ See Kristen Howerton, *I've Got Your Lifestyle Blog Right Here*, HUFFPOST: THE BLOG (May 30, 2014), https://www.huffingtonpost.com/kristen-howerton/ive-got-your-lifestyle-bl_b_5405817.html (highlighting that readers are "not just looking at a fashion spread of anonymous models" when reading blogs, but "are looking at real people . . .").

³⁵ See *id.*

more polished—sometimes staged—websites increased.³⁶ To succeed in an oversaturated market, bloggers began to cultivate personal brands that would be easily recognizable to readers wanting to engage with them on platforms outside of their blog.³⁷

Once a blogger establishes a personal brand, the brand is subsequently promoted across various social media channels.³⁸ Most bloggers use the same social media handle (@galmeetsglam for example) for all channels, as it creates consistency and recognition so that readers may easily follow the blogger on different platforms.³⁹ A blog's readership grows organically as new readers discover the blog via social media.⁴⁰ The purpose of having various channels attached to the blogger's website is to create rapport with the blogger's readership—Instagram posts, Twitter tweets,⁴¹ and YouTube videos offer intimate connections to the blogger that may be absent from the polished posts on her website.⁴² Still, because all channels promote the same brand, they offer similar or, often, the same content.⁴³ One growth tool bloggers employ on social media is providing a link to posts on their blog to drive traffic from social media

³⁶ See *id.* (explaining bloggers are photographing their lives in the same style typically seen in a glossy magazine).

³⁷ See *id.*

³⁸ See Helene Sula, *How to Set Up Your Blog for Success (No Matter what Stage You're In!)*, HELENE IN BETWEEN, <https://heleneinbetween.com/2016/10/how-to-set-up-your-blog-for-success.html> (claiming “social media is essential” and should be used strategically to be successful).

³⁹ Julia Engel originally had the handle @galmeetsglam on Instagram, but once she established a loyal readership she changed her handle to her name; still, her profile name is “Julia Engel (Gal Meets Glam),” maintaining clarity for readers looking for her on Instagram. See, e.g., Julia Engel (@juliaengel), INSTAGRAM, (last visited Jan. 25, 2018), <https://www.instagram.com/juliaengel/?hl=en>; Julia Engel, *About*, GAL MEETS GLAM, (Nov. 7, 2018, 11:08 AM), <http://galmeetsglam.com/about/> (explaining the mission behind her blog, *Gal Meets Glam*, and the content covered); Julia Engel (@galmeetsglam), TWITTER, (Nov. 7, 2018, 11:08 AM), <https://twitter.com/GalMeetsGlam?lang=en>; Gal Meets Glam YOUTUBE, <https://www.youtube.com/user/galmeetsglam>.

⁴⁰ See Melyssa Griffin, *How to Grow Your Blog [Like A Boss]*, MELYSSA GRIFFIN, <http://www.melyssagriffin.com/how-to-grow-your-blog-like-a-boss/> (encouraging bloggers to use social media to grow their blog).

⁴¹ See Aliza Rosen, *Tweeting Made Easier*, TWITTER: BLOG (Nov. 7, 2017), https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html; see also Kristin M. Adams, *Tweet Upon a Star: Organic Brand Engagement with Celebrities on Social Media Platforms*, 8 WM. & MARY BUS. L. REV. 137, 143-4 (2016).

⁴² See Helene Sula, *5 Things I Did That Exploded My Blog*, HELENE IN BETWEEN, <https://heleneinbetween.com/2016/09/5-things-exploded-blog.html> (suggesting that linking from social media channels will drive traffic to a blog and increase readership).

⁴³ Some bloggers “may tweak the language or select different images, but [all content] ties together.” E-mail from Carly A. Heitlinger, Author, Carly the Prepster, to Callie Coker, Author, Million Dollar Bloggers Club (Oct. 16, 2017, 9:10 EST) (on file with author) (answering Bambi's question: How frequently do you share similar or the same content across your social media?). See, e.g., Carly A. Heitlinger, *Apple Picking at Fishkill Farms*, CARLY THE PREPSTER (Oct. 3, 2017), <http://www.carlytheprepster.com/2017/10/apple-picking-fishkill-farms.html> (sharing a fall outfit with affiliate links to the items worn); Carly A. Heitlinger (@carly), INSTAGRAM (Oct. 3, 2017), <https://www.instagram.com/p/BZzRr3mDBcV/?hl=en&taken-by=carly> (featuring photos from a blog post published the same day but showing a behind-the-scenes detail).

channels to the website.⁴⁴ Thus, social media is instrumental to a blogger's business. However, the interconnectedness of blogging and social media is relatively new.⁴⁵ Along with the evolution of blogging transitioning from online diaries to businesses,⁴⁶ there was a parallel evolution of social media branding.⁴⁷ Similar to major companies now hiring social media managers to promote their brands, bloggers now curate their social media to reflect their personal brands and increase traffic to their blog.⁴⁸ Consequently, entire companies grew around the professional blogging phenomenon, making it easier for bloggers to earn income from their websites and social media channels associated with their brands.⁴⁹

Blogging created more niches for companies to fill,⁵⁰ and companies formed for the sole purpose of assisting bloggers in turning their blogs into businesses by simplifying the monetization of blogs.⁵¹ For example, companies such as RewardStyle⁵² and ShopStyle⁵³ are affiliate programs through which bloggers can monetize their sites.⁵⁴ RewardStyle created a LIKEtoKNOW.it feature, which allows bloggers to monetize their social media.⁵⁵ The LIKEtoKNOW.it feature is an application (app), that users download and then they screenshot bloggers'

⁴⁴ See, e.g., Julia Engel (@GalMeetsGlam), TWITTER (Oct. 25, 2017, 5:02 PM), <https://twitter.com/GalMeetsGlam/status/923157857507438592> (linking to a sponsored post with Nordstrom); Carly A. Heitlinger (@carly), TWITTER (Oct. 25, 2017, 4:39 PM), <https://twitter.com/collegeprepster/status/923333180668678144> (linking to a winter coat guide posted on her blog).

⁴⁵ Guy Kawasaki, *How to Integrate Social Media and Blogging from The Art of Social Media*, MARKETO (Jan. 2015), <https://blog.marketo.com/2015/01/how-to-integrate-social-media-and-blogging-from-the-art-of-social-media.html> (claiming "a few years ago blogging and social media were separate . . . now they complement each other").

⁴⁶ Matthew J. Smith, *Bloggging and Podcasting: Challenges, Legal Issues, and Lawyer Advertising*, ABA SCITECH LAW, 1, 20 (2007).

⁴⁷ See Kawasaki, *supra* note 45.

⁴⁸ See Alatheia Hart, *Gaining a Following with The College Prepster*, THE ART OF BEING FEMALE, <http://www.artofbeingfemale.com/growing-following-college-prepster/> (explaining Carly A. Heitlinger' (formally "The College Prepster") use of social media is directly tied to promoting her brand).

⁴⁹ See Elizabeth Holmes, *How Style Bloggers Earn Sales Commissions, One Click at Time*, WALL ST. J. (Feb. 11, 2015, 11:33 PM), https://www.wsj.com/articles/how-style-bloggers-earn-sales-commissions-one-click-at-a-time-1423693911?mod=WSJ_hps_MIDDLE_Video_second (discussing the methods companies created to monetize bloggers' posts).

⁵⁰ See *id.*

⁵¹ See *id.* (explaining the addition of LIKEtoKNOW.it to RewardStyle, which allows monetization of Instagram posts).

⁵² See Annie Malone, *What is RewardStyle and How Does It Work?*, HOME OF MALONES (July 27, 2017), <http://homeofmalones.com/what-is-rewardstyle-how-does-it-work/> (explaining RewardStyle as an invitation only affiliate program, therefore, often used by established bloggers).

⁵³ See *What is ShopStyle Collective?*, SHOPSTYLE COLLECTIVE, <https://shopstylecollective.zendesk.com/hc/en-us/articles/212221646-What-is-ShopStyle-Collective->

⁵⁴ See Holmes, *supra* note 49.

⁵⁵ See *id.*

social media posts.⁵⁶ Then, each time the followers screenshot a photo, they go into the LIKEtoKNOW.it app, and the app links the items in the post available for purchase.⁵⁷ If followers then purchase an item, the blogger gets a commission from the sale.⁵⁸ RewardStyle monetizes the blogger's website by having affiliate links in the blog content, and then their LIKEtoKNOW.it app generates income on the blogger's social media accounts, expanding the business's income from the website to the social media channels.⁵⁹ Thus, affiliate programs recognized bloggers can successfully monetize their websites as well as their social media and created methods through which bloggers could do so efficiently.⁶⁰ Still, social media, as vital as it is, is supplemental to the blog as far as a blogger's business model is concerned.

*A. How Bloggers Employ Social Media Channels
As Part of Their Business Model*

Bloggers receive the most recognition from their website, which is the foundation from which they grow their brand.⁶¹ The purpose of growing the brand is to cultivate a business successful enough to generate income.⁶² There are three ways a blogger can generate income: advertisement space,⁶³ sponsored content,⁶⁴ and affiliate links.⁶⁵ A blogger's ability to sell advertisement space and partner with companies for sponsored content is dependent on loyal readership and engagement.⁶⁶ Affiliate links can be used at a blog's inception, but without readers, they will not generate income.⁶⁷ Income-generating content (affiliate links, advertisements, and sponsored content for example) is predominantly

⁵⁶ Rupa Ganatra, *How LIKEtoKNOW.it Is Driving Influencer Sales At Scale*, FORBES (Mar. 5, 2018, 1:08 PM), <https://www.forbes.com/sites/rganatra/2018/03/05/liketoknow-it-driving-influencer-sales-at-scale/#6ae2724d2298>.

⁵⁷ *Id.*

⁵⁸ Most users' perception of the blogger is unaffected by the blogger receiving a commission. *See id.* In its first nine months of operation, the LIKEtoKNOW.it feature generated \$10 million in sales. *Id.*

⁵⁹ *See* Holmes, *supra* note 49.

⁶⁰ *See id.*

⁶¹ *See* Carly A. Heitlinger, *Updated Blogging Tips*, CARLY THE PREPSTER (Feb. 25, 2016), <http://www.carlytheprepster.com/2016/02/updated-blogging-tips.html>.

⁶² *See id.*

⁶³ *See* Robert Mening, *33 Ways to Monetize a Website (or Blog)*, WEBSITESETUP (June 3, 2016), <https://websitesetup.org/33-ways-to-monetize-website/> (examining how advertisements—whether paid space or pay-per-click—monetize a blog).

⁶⁴ *See id.* (explaining that sponsored content generates income).

⁶⁵ *See id.* (describing how affiliate links generate income).

⁶⁶ *See id.* (describing a blogger's ability to sell advertisement space is dependent on how many impressions (that is, readers) the site receives and that sponsored posts are more common once the blog has steady traffic).

⁶⁷ *See* Leyl Master Black, *4 Steps to Monetize Your Blog Through Affiliate Marketing*, MASHABLE.COM (Feb. 9, 2013), <http://mashable.com/2013/02/09/monetize-affiliate-marketing/#6foW6VHOtgqn> (arguing quality content creates successful affiliate programs).

featured on the main website because the blog yields the highest traffic levels.⁶⁸ Still, social media channels are offshoots of the blog and are primarily used to drive traffic to the website.⁶⁹ In fact, bloggers use social media similarly to how major companies use social media to promote their products or brands across different channels.⁷⁰

Nike's social media, for example, is helpful in understanding the parallel relationship between bloggers' social media use and major companies' social media use.⁷¹ Nike's social media highlights the lifestyle that their consumers would have if they bought Nike products.⁷² Nike's Instagram⁷³ features energetic, adventurous photos and short videos.⁷⁴ The company's Twitter⁷⁵ shows professional athletic teams wearing Nike,⁷⁶ celebrities buying Nike products,⁷⁷ and features clips of consumers using their Nike gear.⁷⁸ Finally, Nike's YouTube channel⁷⁹ features commercials and inspirational videos of celebrities and non-celebrities who buy Nike.⁸⁰ The company uses professional teams and people who their consumers may easily recognize because if consumers recognize the wearer

⁶⁸ See Heitlinger, *supra* note 62 (explaining Heitlinger's social strategy: each channel offers a "360 degree view of the brand" while driving traffic to the blog).

⁶⁹ See *id.*

⁷⁰ Compare Grace Atwood (@graceatwood), INSTAGRAM (Jan. 19, 2018), <https://www.instagram.com/p/BeIjcPKn7Zi/?hl=en&taken-by=graceatwood> (updating her followers on her fitness challenge and inviting them to visit her blog to share their own progress), and @a_southerndrawl, TWITTER (Jan. 22, 2018, 3:32 AM), https://twitter.com/a_southerndrawl/status/955401285737512960 (linking to a post about her weekly workout routine and featuring workout clothing); Fashion Mumblr, *THE LAST VLOGMAS // Travelling to The Maldives // Qatar A380 Business Class*, YOUTUBE (Dec. 11, 2017), <https://www.youtube.com/watch?v=LL-Y94iswS4> (partnering with Qatar for a video), with Nike (@nike), INSTAGRAM (Nov. 6, 2017), <https://www.instagram.com/p/BbLNNIdjLfi/?hl=en&taken-by=nike> (featuring a photo of Kevin Hart running and captioning the photo "Only you can cross your finish line; Congrats @kevinhart4real for Breaking 26.6 at #TCSNYMarathon"), and @Nike, TWITTER (Jan. 23, 2018, 12:09 PM), <https://twitter.com/Nike/status/955895256007958529> (linking to a post about the innovation of Nike's new products), and Nike, *Nike and Kyrie Irving Present: Find Your Groove* (Dec. 25, 2017), YOUTUBE, <https://www.youtube.com/watch?v=gxC6lkqYyQU> (advertising a new shoe Nike developed with the titular NBA player).

⁷¹ See Ben Davis, *30 brands with excellent social media strategies*, ECONULTANCY (Aug. 17, 2016), <https://econsultancy.com/blog/68167-30-brands-with-excellent-social-media-strategies> (listing Nike a strong social media user).

⁷² See Arianna Pride, *What You Can Learn from Nike Branding*, RIVALIQ.COM (Jan. 3, 2017), <https://www.rivaliq.com/blog/nike-branding-strategy/>.

⁷³ Nike (@Nike), INSTAGRAM, <https://www.instagram.com/nike/?hl=en> (last visited Jan. 25, 2018).

⁷⁴ See Carolien Daalderop, *Just Do It: Nike's Employer Brand*, LINK HUMANS BLOG, .

⁷⁵ @Nike, TWITTER, (Nov. 7, 2018, 11:10 AM), <https://twitter.com/Nike?lang=en>.

⁷⁶ See, e.g., @Nike, TWITTER (Sept. 17, 2017, 9:00 AM), <https://twitter.com/Nike/status/909446964260900864>.

⁷⁷ See, e.g., @Nike, TWITTER (Aug. 26, 2017, 3:00 PM), <https://twitter.com/Nike/status/901565055359008768>.

⁷⁸ See, e.g., @Nike, TWITTER (July 16, 2017, 8:09 AM), <https://twitter.com/Nike/status/886603725409669120>.

⁷⁹ Nike, YOUTUBE, <https://www.youtube.com/user/nike> (last visited Feb. 15, 2018).

⁸⁰ See generally *id.*

of the product, and if they are supporters of the person, they are more likely to purchase Nike products.⁸¹

Similarly, bloggers promote their brands across social media channels to promote a lifestyle—social media posts show aspects of bloggers' lives and offer inspiration to readers.⁸² Young college students may turn to a popular college blogger for advice on how to improve their college experience.⁸³ An aspiring stylist may frequent fashion blogs to see what trends are popular.⁸⁴ Thus, bloggers employ social media strategies akin to companies, and effectively curate and edit online magazines that readers rely on in various stages of their lives.⁸⁵ Rather than reading *Cosmopolitan* or *Vogue*, readers turn to their favorite bloggers, people who seem more authentic than magazine writers, whose names appear in a by-line but lack a personal connection.⁸⁶ Hence, the influence professional bloggers have is unparalleled, and their businesses are becoming a hallmark of entrepreneurship.⁸⁷

B. Instagram

The social-media platform, Instagram, launched in October 2010 and was the first platform that focused on images or short video.⁸⁸ Today, bloggers use Instagram as a way to offer snapshots of their daily life and share their blog's content in a quicker, more easily digestible format.⁸⁹ If a reader discovers a blogger via Instagram, the Instagram feed acts as an above the fold preview to

⁸¹ Robert Passikoff, *When It Comes To Nike Celebrity Endorsements, They Have To Make Sure The Shoe Fits (LeBron)*, FORBES (Dec. 12, 2013, 10:22 AM), <https://www.forbes.com/sites/robertpassikoff/2013/12/12/if-the-nike-brand-dont-fit-lebron-cannot-commit-2/#7ff95abb177f>.

⁸² See, e.g., Hilary Rushford, *Brand Stories*, Instagram with Intention (2017) (electronic course) (on file with author) (arguing that social media accounts, collectively, create a brand story and in turn promote a lifestyle, which followers admire and want to engage with).

⁸³ See, e.g., Haley Labian, *The Best College Bloggers*, HONESTLY HALEY (Mar. 3, 2016), <http://honestlyhaley.com/best-college-bloggers/>.

⁸⁴ See, e.g., Kat Collings, *11 Awesome Fashion Blogs on the Rise*, WHOWHATWEAR (July 14, 2014), <http://www.whowhatwear.com/best-fashion-blogs/slide3>.

⁸⁵ See Welburn, *supra* note 33.

⁸⁶ See Cordelia Tai, *A New Survey Suggests Blog Rule, Print Magazines Drool*, THE FASHION SPOT (Aug. 26, 2016), <http://www.thefashionspot.com/runway-news/709815-survey-blogs-more-influential-than-magazines/>.

⁸⁷ A survey of 14,000 people showed 60% of those surveyed have taken a blog post or social media review into consideration while shopping, which contrasts the mere 3% who said they consider celebrity endorsements. Daphne Howland, *Survey: Non-celebrity bloggers better influencers than celebrities*, RETAILDIVE (Mar. 30, 2016), <https://www.retaildive.com/news/survey-non-celebrity-bloggers-better-influencers-than-celebrities/416522/>.

⁸⁸ Lauren Myers, Note, *A Picture is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission's Endorsement Guides*, 66 DUKE L.J. 1371, 1376 (2016).

⁸⁹ See e.g., Heitlinger, *supra* note 61.

what the blog offers.⁹⁰ If the online preview found on Instagram intrigues the reader, they are more likely to click the #linkinbio⁹¹ and visit the online magazine (that is, the main website) associated with the Instagram account.⁹² Additionally, some influencers who teach courses on increasing one's presence on Instagram⁹³ advocate for microblogging within the Instagram platform.⁹⁴ The philosophy behind microblogging is that by offering glimpses of the blogger's mission and content, Instagram users who are not following the blog will eventually convert from not only Instagram followers but to blog readers as well.⁹⁵

With the addition of "Instagram Stories," bloggers have abandoned Snapchat⁹⁶ or decreased use,⁹⁷ and bloggers instead use the video feature within Instagram to do 'question and answer' sessions,⁹⁸ update their readers about day-to-day activities, or give previews of recent blog posts, thus driving traffic from Instagram to their website.⁹⁹ Instagram, recognizing this trend, instituted a feature

⁹⁰ See Hilary Rushford, *Creatively Directing*, Instagram with Intention (2017) (electronic course) (on file with author) (explaining that the Instagram file acts as an above the fold preview of the brand).

⁹¹ When a blogger shares an image that is meant to direct traffic back to her blog, she will include a hashtag that indicates to the user that the link to the full post is in the biography of her profile. See Hannah L. Cook, Comment, *#Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media*, 83 U. CHI. L. REV. 457, 463 (2016) (citing The Twitter Glossary (Twitter), archived at <http://perma.cc/MZ3X-47Y2>) ("A hashtag is a word or phrase (without spaces) preceded by the '#' symbol"). When a hashtag is clicked, the user is directed to posts with the same hashtag. *Id.* "#linkinbio" is common with bloggers and companies. See, e.g., Maxie McCoy (@maxiemccoy), INSTAGRAM (Feb. 24, 2018), <https://www.instagram.com/p/BflhB9jnNaq/?hl=en&taken-by=maxiemccoy>.

⁹² See Hilary Rushford, *Microblogging for Maximum Impact*, Instagram with Intention (2017) (electronic course) (on file with author) (explaining that the more users relate to the content on the Instagram platform, the more likely they are to visit the associated website).

⁹³ See *id.*

⁹⁴ See Rushford, *supra* note 92 (explaining that bloggers should use longer captions that become effectively mini-blog posts, which act as previews to the content available on the blog).

⁹⁵ See *id.*

⁹⁶ Snapchat is a form of social media that allows users to send and receive "snaps," which are photos or videos that disappear after viewing. Michael M. Epstein, *Social Media and "Flash Infringement": Live Music Culture and Dying IP Protection*, 3 BELMONT L. REV. 1, 6-7 (2016). If users add snaps to their "story" it is available for viewing for twenty-four hours before disappearing. *Id.*

⁹⁷ See Shraddha Gupta, *Instagram Stories vs. Snapchat Stories: Good or Bad for Bloggers?*, STREETTROTTER (Aug. 4, 2016), <https://streettrotter.com/inmyopinion/instagram-stories-vs-snapchat-stories-good-or-bad-for-bloggers/> (interviewing various bloggers about their opinions on Instagram stories' impact on Snapchat use).

⁹⁸ See e.g., Julie Fagan, *Instagram Stories Q&A*, PEANUT BUTTER FINGERS (May 17, 2017), <https://www.pbfingers.com/instagram-stories-qa/> (explaining she requested reader questions via an Instagram Stories video).

⁹⁹ See Singh, *supra* note 7 (acknowledging bloggers have "wielded their social media accounts to rake in significant amounts of money for social posts and changed the blogging game by attracting the masses"). Some bloggers admitted to using social media's paid promotions to promote their content to users that are not following them. Andy Crestodina, *Blogging Statistics and Trends: The 2017 Survey of 1000+ Bloggers*, ORBIT MEDIA (Oct. 25, 2017), <https://www.orbitmedia.com/blog/blogging-statistics/#Q9>. In fact, a staggering 95.5% admit to using paid promotion to drive traffic to their sites. *Id.*

for accounts with more than 10,000 followers, where users can now “swipe up” and go directly to the link featured within the platform.¹⁰⁰ This allows Instagram users to visit the blogger’s website while still on Instagram.¹⁰¹ The interactions created by the Instagram feed and within Instagram Stories contribute to readers feeling more connected to the blogger, which increases readership.¹⁰² Further, Instagram users conduct advertisement campaigns, which have grown in number since the platform’s inception and prove especially influential.¹⁰³ As a result, companies look for bloggers on Instagram.¹⁰⁴

Instagram users sometimes share content of other users, but sharing indicates attribution to the original poster, which contrasts users who post others’ content in an attempt to claim authorship. To simplify sharing on the platform, innovators created apps a user may download that allows them to repost Instagram photos that will show, in the corner of the photo, the original poster of the image.¹⁰⁵ Another method for attributing credit on Instagram is to “tag” the user.¹⁰⁶ Tagging is indicated when a user taps the photo and the tagged party’s profile appears, which a user can then click and go to the tagged profile.¹⁰⁷

C. Twitter

Lifestyle blogger Summer Telban, of *Coffee with Summer*, recommends bloggers use Twitter for five reasons: driving traffic to the blog, networking and increasing a blogger’s community, fostering real-time engagement, and sharing content.¹⁰⁸ In 280 characters or less, bloggers share their thoughts with their readers, offering effective real time engagement, despite the less curated use of the platform.¹⁰⁹ Whether the bloggers request recommendations for an upcoming trip,¹¹⁰ update their readers on their travel plans,¹¹¹ or let their followers know

¹⁰⁰ Taylor Loren, *How to Add Links to Instagram Stories: 3 Steps to Drive Traffic & Sales*, LATER.COM: BLOG (May 25, 2017), <https://later.com/blog/add-links-instagram-stories/>.

¹⁰¹ *Id.*

¹⁰² *Id.* (highlighting that adding a “call to action” is vital to drive traffic to the website linked).

¹⁰³ “Instagram users are 120 times more likely to engage with in-platform ads on Instagram than Twitter users.” Myers, *supra* note 88, at 1376-77.

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Nina Dobrev (@nina), INSTAGRAM (Dec. 27, 2017), <https://www.instagram.com/p/BdOOx1pFMp7/?hl=en&taken-by=nina> (showing that Dobrev used an app to repost a photo originally posted by @ilariaurbinati).

¹⁰⁶ See, e.g., Angela Williams (@hazelandhazelphotography), Instagram, https://www.instagram.com/hazelandhazelphotography/p/BdP3MhoAor0/?utm_source=ig_web_copy_link (last visited Jan. 25, 2018) (tagging Jenna Kutcher (@jennakutcher), who created the graphic that Williams posted).

¹⁰⁷ *Id.*

¹⁰⁸ See Summer Telban, *5 Reasons Why Bloggers Should Use Twitter*, COFFEE WITH SUMMER (June 7, 2016), <http://www.coffeewithsummer.com/bloggging-social/bloggers-use-twitter/>.

¹⁰⁹ *Id.*; see also Paul Gil, *What is Twitter & How Does it Work?*, LIFEWIRE (Updated Nov. 11, 2018), <https://www.lifewire.com/what-exactly-is-twitter-2483331>

¹¹⁰ See, e.g., Carly A. Heitlinger (@carly), TWITTER (Oct. 3, 2017; 9:07 AM), <https://twitter.com/carly/status/915246866870259712>.

what television shows they watch,¹¹² readers use Twitter to interact casually and quickly with bloggers.¹¹³ Further, Twitter is a platform where bloggers share their thoughts and reactions to world events, likely encouraging dialogue with readers that may be more politically or emotionally charged than the other social media channels.¹¹⁴

Similar to Instagram, Twitter has a sharing function. Twitter is also effective for growing a blogger's presence because of the "retweet" action.¹¹⁵ When a blogger posts, her followers may "retweet" her tweet, which makes the post appear on the follower's page, but maintains attribution to the blogger.¹¹⁶ Followers of the retweeting user can then discover the blogger and follow the blogger's account.¹¹⁷ Thus, Twitter allows the blogger to grow her readership by passively spreading her content.¹¹⁸

D. YouTube

YouTube videos offer a fresh perspective for many blog readers to interact with the bloggers.¹¹⁹ Due to the written nature of blogs, videos are seldom included in most blog posts.¹²⁰ In order to make bloggers more relatable, some bloggers embed YouTube videos within their blog posts.¹²¹ The video medium

¹¹¹ See, e.g., Julia Engel (@galmeetsglam), TWITTER (Oct. 3, 2017; 4:63 PM), <https://twitter.com/GalMeetsGlam/status/915357450584383488>.

¹¹² See, e.g., Carly A. Heitlinger (@carly), TWITTER (Aug. 29, 2017; 6:27 PM), <https://twitter.com/carly/status/902704296176832512>.

¹¹³ See, e.g., *supra* at notes 111-113

¹¹⁴ See, e.g., Grace Atwood (@graceatwood), TWITTER (Jan. 23, 2018, 4:11AM), <https://twitter.com/AlyssaMastro44/status/955775017383616517> (retweeting Alyssa Mastromonaco's tweet to respond to President Donald Trump); Keiko Lynn (@keikolynn), TWITTER (Aug. 19, 2017, 12:52PM), <https://twitter.com/keikolynn/status/898996185956069376> (responding to President Trump's tweet, saying "won't denounce Nazis without 'the facts' but is very quick to call counter-protestors 'anti-police agitators').

¹¹⁵ Adams, *supra* note 41, at 146 (explaining that the retweet function "preserves the content and includes attribution to the original source, showing all other Twitter users whose original idea the tweet conveys").

¹¹⁶ See *id.* at 146.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ Hilary George-Parkin, *Why Are Fashion Bloggers Suddenly Getting Into Vlogging?*, FASHIONISTA (Mar. 24, 2017), <https://fashionista.com/2017/03/top-fashion-bloggers-youtube-video> (examining the rise in bloggers using YouTube as a new platform to strengthen their brands).

¹²⁰ See *id.* (James Nord, founder of influencer-marketing platform *Fohr Card*, believes video is king: "I need to move into video just because the world of long-form written content and photos is quickly disappearing. It's grow or die, essentially.").

¹²¹ See, e.g., Julia Engel, *Vintage Curls Hair Tutorial*, GAL MEETS GLAM (Aug. 14, 2017), <http://galmeetsglam.com/2017/08/vintage-curls-hair-tutorial/> (including a YouTube video giving a step-by-step visual); Carly A. Heitlinger, *Paris Travel Guide*, CARLY THE PREPSTER (June 6, 2017), <http://www.carlytheprepster.com/2017/06/paris-travel-guide.html> (embedding a video of Heitlinger visiting the locations mentioned in her Paris travel guide).

offers a new approach for blog readers to consume content¹²² because videos depict the blogger doing everyday activities¹²³ but also allow the reader to see a “behind-the-scenes” view of the blog.¹²⁴ For example, videos may feature bloggers traveling,¹²⁵ giving tutorials,¹²⁶ or answering frequently asked reader questions.¹²⁷ In addition to embedding videos, bloggers have YouTube channels, where people surfing through the site can discover their channels, and by extension, the bloggers.¹²⁸ Intrigued, the new viewer may then visit a blogger’s website and the blog gains a new reader.¹²⁹

On YouTube, there are multiple sharing buttons that appear under a video so viewers may share a video on Twitter and other social media platforms.¹³⁰ Sharing is a key feature of social media and beneficial to bloggers’ businesses because the act of users sharing their content widens their audience while maintaining their status as content creators.¹³¹ However, stealing content¹³² is a concern for most bloggers, whose success and reputation is dependent on their ability to generate unique content.¹³³ Bloggers are more successful if they produce content only available on their website.¹³⁴ Thus, when users post a blogger’s content without proper attribution, a blogger’s business is directly, negatively impacted.¹³⁵

¹²² Parkin, *supra* note 120. (Arielle Charnas of *Something Navy* finds that “readers prefer the raw, real-time video on Instagram Stories,” making video an increasingly important component of her business.).

¹²³ See, e.g., Danielle Marie Carolan, *Day in my Life: Atlanta*, YOUTUBE (Sept. 27, 2017), https://www.youtube.com/watch?v=nNC_9854hjk.

¹²⁴ See, e.g., Carly A. Heitlinger, *A Floral Frock*, CARLY THE PREPSTER (Oct. 15, 2017), <http://www.carlytheprepster.com/2017/10/a-floral-frock.html> (linking to a YouTube video for readers who “want some behind the scenes” footage).

¹²⁵ See, e.g., Carly the Prepster, *Nantucket Travel Diary*, YOUTUBE (July 24, 2017), <https://www.youtube.com/watch?v=TI7YR082qj8>.

¹²⁶ See, e.g., Gal Meets Glam, *My Daily Makeup Routine*, YOUTUBE (Sept. 5, 2017), <https://www.youtube.com/watch?v=39AGmiml8sg>.

¹²⁷ See, e.g., Carly the Prepster, *Frequently Asked Questions*, YOUTUBE (Nov. 24, 2013), <https://www.youtube.com/watch?v=UP87SCHIS4s&t=490s>.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See YouTube Help, *Share videos and channels*, <https://support.google.com/youtube/answer/57741?co=GENIE.Platform%3DDesktop&hl=en>.

¹³¹ See Helene Sula, *5 Things a High Traffic Blog Needs*, HELENE IN BETWEEN, <https://heleneinbetween.com/2017/09/5-things-high-traffic-blog-needs.html>.

¹³² See Lindy Herman & Sean Lynch, *Copyright Infringement Risks on Social Media*, 57 ORANGE COUNTY LAW. 34, 36 (explaining that sharing creates copyright concerns on social media if users do not give proper credit to the source of the post).

¹³³ See Joshua Fields Millburn, *How to Start a Successful Blog in 2018*, THE MINIMALISTS (Dec. 26, 2017), <https://www.theminimalists.com/blog/> (describing original content as necessary to creating a successful blog).

¹³⁴ See *id.*; see also Hilary Rushford, *A Story Only Heard Here*, Instagram with Intention (2017) (electronic course) (on file with author).

¹³⁵ See Krisi Hines, *Content Scrapers – How to Find Out Who is Stealing Your Content & What to Do About It*, KISSMETRICS: BLOG (Jan. 9, 2012), <https://blog.kissmetrics.com/content-scrapers/> (describing the importance of preventing stolen content).

II. THE FEDERAL TRADE COMMISSION'S REGULATION OF DISCLOSURE OF ADVERTISEMENTS AS A VEHICLE TO ADVOCATE FOR MORE EFFECTIVE COPYRIGHT PROTECTION FOR BLOGGERS ACROSS SOCIAL MEDIA CHANNELS

When blogging gained traction and turned from a hobby into a career,¹³⁶ companies recognized the influence that bloggers had over their readers.¹³⁷ Specifically, companies realized blog readers and social media followers are often inspired to purchase products that bloggers feature on their sites and channels.¹³⁸ While many new bloggers may review or feature items without outside influence from a company,¹³⁹ many professional bloggers receive compensation for a post¹⁴⁰ or receive company products “courtesy of”¹⁴¹ from the company in exchange for a post that features the products.¹⁴² Thus, companies now capitalize on the relationship between bloggers and their readers (that is, readers respect and value the opinions of the bloggers they follow).¹⁴³ The respect that readers afford to bloggers leads companies to conduct blogger outreach.¹⁴⁴ If outreach to the

¹³⁶ See Helene Sula, *How to Add Your Blog to Your Resume*, HELENE IN BETWEEN, <https://heleneinbetween.com/2015/02/how-to-add-your-blog-to-your-resume-2.html> (offering tips for making “something [people] do for a hobby” into a career).

¹³⁷ See Elina Rakhlin, Note, *Will Blog for Food: Sponsored Content in the Age of Millennials*, 35 CARDOZO ARTS & ENT LJ 481, 482 (2016).

¹³⁸ See Aimee Khuong, Note, *Complying with the Federal Trade Commission's Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms as Marketing and Advertising Spaces*, 13 HASTINGS BUS. L.J. 129, 137 (2016) (explaining an advertisement campaign where bloggers featured a dress from Lord & Taylor on their Instagram accounts and the dress sold out quickly after); see also Rachelle Bergstein, *Social Media Stars Reveal How They Get So Rich*, NEW YORK POST (Oct. 28, 2017), <http://nypost.com/2017/10/28/online-influencers-reveal-how-they-really-get-free-clothes-and-six-figure-salaries/> (discussing how social media influencers make money, highlighting that a company sued an influencer for a negative review that the company believed damaged its business).

¹³⁹ See, e.g., Fran Acciaro, *White on White in the Hamptons*, FRAN ACCIARDO (Aug. 11, 2015, 5:00 AM), <http://www.franacciaro.com/2015/08/white-on-white-in-hamptons.html> (sharing a personal outfit with no encouragement from the companies she purchased the items from).

¹⁴⁰ See, e.g., Helene Sula, *Disclosure and Privacy Policy*, HELENE IN BETWEEN, <https://heleneinbetween.com/disclosure-policy> (explaining her blog's disclosure policy and that she does and will accept monetary compensation for posts).

¹⁴¹ See, e.g., Carly A. Heitlinger, *A Classic Fall Look*, CARLY THE PREPSTER (Sept. 24, 2017), <http://www.carlytheprepster.com/2017/09/classic-fall-look.html> (sharing an outfit featuring “courtesy of” pieces from Talbots, which she styled and then shared her opinion about the pieces).

¹⁴² See Leah Wise, *No, I'm Not Doing More Sponsored Posts Than Other Bloggers. I'm just Disclosing*, STYLE-WISE (Mar. 6, 2017), <http://www.stylewise-blog.com/2017/03/no-im-not-doing-more-sponsored-posts-ftc-disclosures.html>.

¹⁴³ See Rebecca Kersten, *Using Bloggers to Promote Your Business – 5 Simple Tips*, LINKEDIN.COM: BLOG (Sept. 3, 2014), <https://www.linkedin.com/pulse/20140903220212-44322153-using-bloggers-to-promote-your-business-5-simple-tips/> (explaining that recommendations and customer reviews are two of the most powerful advertising tools and encouraging companies to partner with bloggers).

¹⁴⁴ See Heitlinger, *Updated Blogging Tips*, *supra* note 62 (detering new bloggers from reaching out to companies and instead encouraging them to wait until companies contact them).

blogging community is successful, companies collaborate with bloggers, which then spreads awareness for the companies' brand or products.¹⁴⁵

With this new form of marketing, the Federal Trade Commission (FTC) realized bloggers could deceive readers who believed they received the blogger's opinion without realizing there was a material connection between the company and the blogger.¹⁴⁶ Many blog readers believe that bloggers are less influenced by companies, unlike celebrity endorsements, whose sponsorships are more obvious to consumers.¹⁴⁷ When a blog's audience reads a review of a product, there is greater trust that the reader receives the blogger's uninfluenced opinion.¹⁴⁸ Due to this concern, the FTC implemented guidelines for social media users regarding how to use social media ethically to promote partnerships with brands.¹⁴⁹

Bloggers have three types of posts for which they may receive compensation from outside brands and must follow FTC guidelines: sponsorships, advertisements, or partnerships.¹⁵⁰ In sponsored posts, a blogger receives compensation to publish a post that is either written by the blogger or prepared by the sponsor.¹⁵¹ Sponsored posts usually include at least one link to the company's site.¹⁵²

There are three primary forms of advertisements on bloggers websites.¹⁵³ Pay-per-click advertising means the advertiser compensates the blogger each time readers click on the advertisement.¹⁵⁴ Companies buy space from bloggers to advertise on website sidebars.¹⁵⁵ Pay-per-impression advertisements are structured so the advertiser pays each time an advertisement appears on the website.¹⁵⁶ Some bloggers have rotating advertisements, so a company's advertisement appears

¹⁴⁵ See Rakhlin, *supra* note 138, at 482.

¹⁴⁶ See *id.*; see also Aimee Khoung, Note, *Complying with the Federal Trade Commission's Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms as Marketing and Advertising Spaces*, 13 HASTINGS BUS. L.J. 129, 133 (citing FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009)) ("A 'material connection' is one that might 'materially affect the weight and credibility of the endorsement'").

¹⁴⁷ A 2011 survey found that 20% of women who use social media are motivated to try products the bloggers they follow advertise, whereas only 13% consider products advertised by celebrities. *Need a Product Endorsement? Look to Bloggers Not Celebrities* (Apr. 19, 2011), BUSINESS NEWS DAILY, <http://www.businessnewsdaily.com/882-bloggers-celebrities-influence.html>. Additionally, roughly 53% of women have purchased a product based on a blogger's recommendation. *Id.*

¹⁴⁸ See *id.*

¹⁴⁹ Federal Trade Commission Advertising Guidelines § 33:151.

¹⁵⁰ See Merritt Beck, *How to Monetize Your Blog and Establish Brand Partnerships*, THE STYLE SCRIBE (May 28, 2016), <https://thestylescribe.com/2016/05/28/fashion-blogging-make-money-partner-brands/>.

¹⁵¹ See Jason Castellani, *What is a Sponsored Post?*, BLOG ADVERTISING RATES (Sept. 11, 2011), <http://blogadvertisingrates.com/2011/09/09/what-is-a-sponsored-post/>.

¹⁵² See *id.*

¹⁵³ See Susan Gunelius, *Blog Advertising Overview*, LIFEWIRE (Feb. 27, 2017), <https://www.lifewire.com/blog-advertising-overview-3476524>.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

once every few website visits.¹⁵⁷ Pay-per-action advertisements occur when the blogger is compensated each time the advertisement is clicked and the user completes an action.¹⁵⁸ For example, if a link or widget is included in a blog post that leads the consumer to the product featured, such as a blazer, and the reader clicks the link or photo to purchase the blazer, the blogger receives compensation for that action.¹⁵⁹

A partnership between a brand and a blogger can take two forms: gifting and flat fee projects.¹⁶⁰ Gifting partnerships are the epitome of “courtesy of” receipt—a company gifts the blogger their products, which the blogger then features on her website.¹⁶¹ Rather than receive monetary compensation, the blogger receives free products.¹⁶² Under the FTC Guidelines, bloggers must disclose when they receive items “courtesy of” from a company.¹⁶³ Flat fee projects vary, but an example is hosting an event at a company’s store, which results in a flat fee charge to the company.¹⁶⁴

The type of post the company requests may vary and the company may limit the post to a single platform.¹⁶⁵ For example, some bloggers agree to work with a brand to advertise their products on Instagram.¹⁶⁶ The blogger shares a photo either using or featuring the product, but the post will not be featured on her blog unless the blogger has an Instagram slideshow on her website.¹⁶⁷ However, if a blogger features a sponsored post in which she shares or reviews a product on her blog, then shares a photo from the blog post on her Instagram, according to FTC Guidelines, she must disclose that the post is sponsored on both the blog post and the Instagram post.¹⁶⁸ Companies such as Instagram, seemingly in an attempt to

¹⁵⁷ See, e.g., A BEAUTIFUL MESS, <http://abeautifulmess.com/> (last visited Oct. 23, 2017) (on one visit, a Macy’s ad ran, upon refreshing the page an advertisement for The Shelter Pet Project appeared; upon a third refresh an advertisement for Mark & Graham appeared).

¹⁵⁸ See Gunelius, *supra* note 154 (disclosing that if a reader clicks the advertisement and completes a purchase, the blogger will receive compensation for the transaction).

¹⁵⁹ See *id.*

¹⁶⁰ See Beck, *supra* note 150.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*; see, e.g., Carly A. Heitlinger, *Shuffle Off to Buffalo*, CARLY THE PREPSTER, <http://www.carlytheprepster.com/2016/12/how-to-wear-a-beret.html> (featuring a holiday look created in partnership with Nordstrom) (last visited Dec. 11, 2016); Grace Atwood, *The Dry Shampoo You Need to Try!*, THE STRIPE, <https://thestripe.com/2017/05/drybar-detox-whipped-dry-shampoo-foam-review/> (featuring a review of a beauty product) (last visited May 2, 2017); Grace Atwood, *Coffee Table Makeover*, THE STRIPE, <https://thestripe.com/2016/06/small-space-makeover-nyc/> (last visited June 14, 2016) (featuring apartment inspiration sponsored by Horchow and ShopStyle).

¹⁶⁵ See, e.g., Carly A. Heitlinger (@Carly), INSTAGRAM, <https://www.instagram.com/p/BNp7zDajnNU/> (Dec. 5, 2016) (featuring a partnership with Uniqlo apparel, which appears on Instagram but not on other platforms, not even her blog).

¹⁶⁶ See, e.g., *id.*

¹⁶⁷ See *id.* (showing an example where the post was not featured on Heitlinger’s blog, but appeared on the Instagram grid on her website’s sidebar).

¹⁶⁸ Khuong, *supra* note 138.

make compliance with the FTC more effective and simpler, implemented changes to their app.¹⁶⁹ Specifically, Instagram now allows users to disclose that a post is a paid partnership above the geotag feature¹⁷⁰ below the username and above the photo.¹⁷¹ Instagram's implementation of the disclosure feature responds to various companies running afoul of FTC guidelines. The FTC Guidelines for disclosure extend from the blog to the social media channel on which the same content is shared.¹⁷² However, bloggers are expected to register individual posts with the U.S. Copyright Office, and the protection of the registration does not extend to the social media channels associated with the brand, despite the fact that all channels operate under the umbrella of the blog's brand.¹⁷³ Despite the notion that bloggers just blog, blogs are unquestionably businesses and they should receive greater protection for their creative content, which is the soul of their business.¹⁷⁴

III. CURRENT COPYRIGHT PROTECTIONS FOR BLOGGERS

Copyright protection originates in 1790 with the passage of the Copyright Act.¹⁷⁵ Works protected by the Copyright Act include literary works, videos, and photographs.¹⁷⁶ Blog posts are typically a conglomeration of different copyrightable works, which fall within the protection of the Act.¹⁷⁷ Generally, copyright protection is automatic for copyrightable material.¹⁷⁸ "Automatic" translates to copyright protection attaching as soon as a blogger hits "publish" on a blog post.¹⁷⁹ The Copyright Act grants rights to bloggers, including where the blog's content is posted and the ability to prevent others from using the content without the author's authorization.¹⁸⁰ The blogger, however, does have the option of selling the rights to the work or granting third parties the right to use the

¹⁶⁹ Sarah Frier, *Instagram to Make It Clearer When Influencer Posts Are Paid Ads*, BLOOMBERG TECHNOLOGY, (June 14, 2017), <https://www.bloomberg.com/news/articles/2017-06-14/instagram-to-make-it-clearer-when-influencer-posts-are-paid-ads>.

¹⁷⁰ David Cohen, *Instagram Just Added a Tag to Make Sponsored Content More Transparent*, ADWEEK, <https://www.adweek.com/digital/instagram-paid-partnership-with/> (last visited Nov. 7, 2018).

¹⁷¹ See, e.g., Danielle Carolan (@daniellecarolan), INSTAGRAM, (Nov. 15, 2017), <https://www.instagram.com/p/BbiMrnQIEj-/?hl=en&taken-by=daniellecarolan> (disclosing the post is a paid partnership with Under Armor Women).

¹⁷² See Julie Zerbo, *A How-To Guide for Properly Disclosing Your Sponsored Posts*, THE FASHION LAW, (Aug. 31, 2016), <http://www.thefashionlaw.com/home/a-how-to-guide-for-properly-disclosing-your-sponsored-posts> (discussing the need to disclose if bloggers are posting multiple posts (Instagram post, blog post, and twitter tweet for a brand, for example)).

¹⁷³ See *infra* Part III.

¹⁷⁴ See *infra* Part III.

¹⁷⁵ RUTH CARTER, *THE LEGAL SIDE OF BLOGGING FOR LAWYERS* 15-39 (2014).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ RUTH CARTER, *THE LEGAL SIDE OF BLOGGING FOR LAWYERS* 15-39 (2014).

copyrighted work.¹⁸¹ Still, absent authorization, the copyright remains in the hands of the blogger.¹⁸²

Copyright protection for individuals extends for the duration of their life plus seventy years.¹⁸³ Bloggers are individuals under the statute and are granted protection as such.¹⁸⁴ Though copyright protection is automatic, registration with the U.S. Copyright Office remains an important step for bloggers creating a business because the legal recourse for infringement is limited without registration.¹⁸⁵ Further, policing for infringement currently remains at the blogger's discretion.¹⁸⁶

A. Why Bloggers Should Register Their Websites with the U.S. Copyright Office

Registration with the U.S. Copyright Office is important because it allows bloggers legal remedies to protect their content.¹⁸⁷ As bloggers transition from hobby-writers to entrepreneurs to businesspeople, the need for copyright protection intensifies.¹⁸⁸ It is necessary to have registered copyright protection because the blog's success is based on the blogger's ability to create original content and that content determines whether the blog will generate income.¹⁸⁹ Additionally, the more popular the blogger's business, the more unjust enrichment becomes a problem.¹⁹⁰

¹⁸¹ *Id.* Many companies will request users' permission to repost their posts on social media, recognizing that the creator has rights to the photo. *See, e.g.,* Corrine Stokoe (@mintarrow), INSTAGRAM (JULY 2, 2018), https://www.instagram.com/p/Bkvydvsnb6u/?utm_source=ig_share_sheet&igshid=aopy1pmq104r (showing J. Crew's request to use the photo for their own marketing purposes).

¹⁸² CARTER, *supra* note 175.

¹⁸³ *Id.* (explaining that for works created after January 1, 1978 copyrights held by individuals continue for seventy years after the individuals' death).

¹⁸⁴ *See id.*

¹⁸⁵ *Id.*

¹⁸⁶ Daniel Doft, *Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy*, 49 J. MARSHALL L. REV. 959, 988-89 (2016) (explaining users are responsible for finding infringing material and reporting it to the social media website).

¹⁸⁷ *See supra* Part I.

¹⁸⁸ Digital Millennium Copyright Act Services Ltd., *How do I get Copyright Protection for my blog?*, DMCA.COM (modified Nov. 7, 2016), <https://www.dmca.com/FAQ/How-do-I-get-copyright-protection-for-my-blog> (claiming that "protecting [their] blog[s] against theft is now considered mandatory for most content owners").

¹⁸⁹ Millburn, *supra* note 133.

¹⁹⁰ For example, if the blogger's content is not adequately protected, other users or companies may use the blogger's content freely without expending their own resources. The company or user then profits on the work of another without giving proper credit, thus unjustly enriching the infringing party. However, it is important to note some courts have found unjust enrichment claims are preempted by copyright law. *See* R. David Donoghue, *Unjust Enrichment Claim Is Preempted by Copyright Law*, CHICAGO IP LITIGATION (Aug. 1, 2007), <https://www.chicagoplitigation.com/2007/08/unjust-enrichment-claim-is-preempted-by-copyright-law/>. Still, unjust enrichment can be an independent cause of action. *Id.*

To sue for copyright infringement, a work must be registered with the U.S. Copyright Office.¹⁹¹ If infringement occurs, and a blogger's content is not registered, the blogger has minimal legal recourse.¹⁹² Given the lack of recourse without registration,¹⁹³ bloggers should register their websites with the U.S. Copyright Office to prepare proactively to enforce copyright claims.¹⁹⁴ However, registration is complicated because the Copyright Act impedes the methods through which blogs can be registered.¹⁹⁵

To effectively protect professional bloggers, the Copyright Act should first consider blogs serial works, similar to newspapers or magazines,¹⁹⁶ which would allow a blog's current and future content registered copyright protection.¹⁹⁷ Then the Act should allow the protection to extend to social media channels because social media posts are effectively reproductions of the blog's content.¹⁹⁸

B. Blogs Should Be Considered and Registered as Serial Works

A roadblock that bloggers face in their attempt to gain copyright protection is that they are limited in how they can register their websites.¹⁹⁹ According to the Copyright Office, once text, photos, and graphics are put on the Internet, they are published for Copyright purposes.²⁰⁰ However, because blog posts are published one at a time, bloggers are expected to register posts individually.²⁰¹ By contrast, websites receive copyright protection to the extent the websites' content is original.²⁰² Still, blogs are not considered "websites" for the purposes of registration, despite the fact that many professional bloggers own their domain,²⁰³ are self-hosted,²⁰⁴ and design their site as an online magazine.²⁰⁵ Therefore, if blogs cannot receive copyright protection as websites, they should be registered as serial works.²⁰⁶

¹⁹¹ See CARTER, *supra* note 175, at 16.

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *infra* Part III.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See Michelle Kaminsky, Esq., *Bloggng and Intellectual Property Law*, LEGALZOOM.COM, <https://www.legalzoom.com/articles/bloggng-and-intellectual-property-law>.

²⁰⁰ STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK: WHAT EVERY WRITER NEEDS TO KNOW* 77-78 (2014) (citing United States Copyright Office, Mandatory Deposit of Published Electronic Works Available Only Online; Interim Rule 37 CFR § 202 (Jan. 25, 2010)).

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See Helene Sula, *Start a Profitable Blog*, HELENE IN BETWEEN, <https://heleneinbetween.com/start-profitable-blog> (recommending bloggers own their website's domain if they want to profit from their blog).

²⁰⁴ See *id.* (recommending that bloggers use self-hosted sites).

²⁰⁵ See *id.*

²⁰⁶ See CARTER, *supra* note 175.

Serial works, as defined by the Copyright Office, are “issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely.”²⁰⁷ Group registration is allowed for a group of serial publications if they meet specific requirements.²⁰⁸ The first requirement, that the claim of copyright be in a collective work, may be difficult for blogs to satisfy.²⁰⁹ A collective work is defined as “a compilation, such as an issue periodical, anthology, or encyclopedia in which a number of separate and independent works are assembled into one work.”²¹⁰ Though a collective work involves an editor compiling pieces from various authors, authorship of the whole collective work may be claimed.²¹¹ There are blogs that have a single person or duo at the forefront, while also employing a team of writers.²¹² Lifestyle blogs such as *A Cup of Jo* and *A Beautiful Mess* are analogous to magazines, regularly posting content on a rigid schedule²¹³ and having weekly or monthly features.²¹⁴ Given the analogous nature of blogs and magazines, the first requirement seems satisfied by blogs such as *A Cup of Jo* and *A Beautiful Mess*.²¹⁵ If the Copyright Act allowed blogs such as *A Cup of Jo* or *A Beautiful Mess* to be collective works, the inclusion should extend to all professional blogs, regardless of whether the blog features posts by a team or a single person.²¹⁶ The business status of a blog is not dependent on whether a creative team or a single person run the site.²¹⁷ Though some bloggers have in-house photographers that they employ, and other bloggers

²⁰⁷ *Help: Type of Work*, COPYRIGHT.GOV, <https://www.copyright.gov/eco/help-type.html>.

²⁰⁸ *Id.* The requirements are: the claim to copyright must be in the collective work; the works must be essentially all new collective works or issues; each issue must be a work made for hire, the author(s) and claimant(s) must be the same person(s) or organization(s) for all the issues; the serial must be published at intervals of one week or longer; all issues in the group must be published within a three month period; each issue must have been created no more than one year prior to the date of publication of that issue; all issues in the group must have been published within the same calendar year; at least two issues must be included on each group application.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See Joint Authorship and Collective Works*, UNIVERSITY OF CALIFORNIA: COPYRIGHT, <http://copyright.universityofcalifornia.edu/ownership/joint-works.html>.

²¹² *See, e.g.*, THE STYLE SCRIBE, <https://thestylescribe.com/> (last visited Jan. 29, 2018); A BEAUTIFUL MESS, <https://abeautifulmess.com/> (last visited Jan. 29, 2018).

²¹³ *See, e.g.*, *Blog Post Planning Marker Board*, A BEAUTIFUL MESS (Oct. 20, 2012), <https://abeautifulmess.com/2012/10/blog-post-planning-marker-board.html>.

²¹⁴ *See, e.g.*, Rita Barry, *Daily, Weekly & Monthly Blogging Checklist*, RITA BARRY (Nov. 12, 2014), <https://ritabarry.co/daily-weekly-monthly-blogging-checklist/> (outlining possible blogging schedules bloggers may use).

²¹⁵ *See Joint Authorship and Collective Works*, *supra* note 211. Magazines are included in the serial work definition. *See Help: Serial Issues*, COPYRIGHT.GOV, <https://copyright.gov/eco/help-serial.html>.

²¹⁶ *See* Rachel Strugatz, *Bloggers and digital influencers are reshaping the fashion and beauty landscape*, LA TIMES (Aug. 10, 2016), <http://www.latimes.com/fashion/la-ig-bloggers-20160809-snap-story.html> (discussing the business savvy of individual bloggers and how their influence rivals that of team-run blogs).

²¹⁷ *See* Rao, *supra* note 4 (explaining Rachel Parcell’s nearly million-dollar business is run exclusively by Parcell); *see also* Diamond, *supra* note 7 (chronicling the progression of *A Cup of Jo* from a one-woman business to a team business).

hire freelance photographers, the business status of both is equal.²¹⁸ The sole meaningful difference between team-based blogs, such as *A Beautiful Mess* and individuals, such as Kentucky-based blogger Grace Wainwright of *A Southern Drawl*,²¹⁹ is a difference of business model.²²⁰ A blogger chooses whether to hire employees or hire freelancers.²²¹ Various reasons may lead a blogger to employ a certain business model, but both business are legitimate and deserve protection.²²² One solution, outside of collective work designation, is that bloggers can and should have for an assignment of rights agreement with any contributors to their blogs, regardless of whether team-based or individually run.²²³ This would allow them to hold all copyrights for material posted on the blog. However, should the blogger forego such an agreement, if a blog is considered a collective work, they will own the copyright of the whole work (i.e. the blog), but the photographer or contributing writer may retain copyright in their individual contribution.²²⁴ Therefore, blogs, whether team-led or individually managed, should be considered collective works in the absence of assignment agreements with their contributors because individual posts constitute independent works compiled into one publication.²²⁵

There are potential challenges to whether blogs satisfy the second requirement of the serial work designation, which stipulates that the works must be all new collective works or issues.²²⁶ This requirement is dependent on how posts are grouped within the three-month period to create an issue.²²⁷ However, posts would be new because new content for the blog is produced at a more rapid rate than most publications (for example, print magazines).²²⁸ The requirement would be easily satisfied because the content is always going to be new.²²⁹

²¹⁸ Rachel Parcell's husband takes most of her site's photos, but she will use a local Utah photographer occasionally. Rachel Parcell, *FAQ*, PINK PEONIES BY RACHEL PARCELL, <http://pinkpeonies.com/faq/> (last visited Oct. 14, 2018). Joanna Goddard, on the other hand, hires a team. *See* Diamond, *supra* note 7.

²¹⁹ *See* Potter, *supra* note 14 (explaining that Wainwright started her blog as a hobby and now relies on friends and family to help with aspects of the business).

²²⁰ *See* Singh, *supra* note 7 (arguing that bloggers "changed the blogging game by attracting the masses and forming sustainable business models").

²²¹ *See, e.g.*, Carly A. Heitlinger, *Introducing Carter*, CARLY THE PREPSTER (Aug. 16, 2017), <http://www.carlytheprepster.com/2017/08/introducing-carter.html> (explaining that Heitlinger changed her business model by hiring her first full-time employee in lieu of working with freelancers).

²²² *See id.*

²²³ 17 U.S.C. § 101 (definition of a transfer of copyright ownership includes an assignment of rights).

²²⁴ *See* Brent A. Olson, 20A1 Minn. Prac. § 15:17 (Nov. 2017).

²²⁵ *See id.* (explaining what collective works are and includes periodicals, which is analogous to a blog's structure).

²²⁶ *See Help: Serial Issues*, *supra* note 215.

²²⁷ *See infra* p. 60.

²²⁸ While there are daily, weekly, and monthly magazines, some bloggers post multiple posts in a day (including weekends). *See, e.g.*, A BEAUTIFUL MESS, <https://abeautifulmess.com/> (last visited Jan. 29, 2018).

²²⁹ *See, e.g., id.*

The most challenging requirement for bloggers to satisfy is whether a blog post is a work made for hire.²³⁰ Under the Copyright Act, a “work made for hire,” is defined as “a work prepared by an employee within the scope of his employment.”²³¹ Typically, determining whether a work is “made for hire” follows a three prong analysis: “(1) whether the work is of the kind the employee is employed to perform; (2) whether the work occurs substantially within authorized work hours; and (3) whether the work is performed, at least in part, to serve the employer.”²³² Works made for hire are usually designated by a written assignment agreement between the employer and employee.²³³ However, blogs fall into a grey area because there is not always a traditional employee-employer relationship.²³⁴ Courts tend to hold that if content is only created because the employer requests the creation, the work will be a work made for hire.²³⁵ For blogs that have creative teams, and thus have employees, creative content created for the blog should be considered a work made for hire, which would grant copyright to the blogger who commissioned the work.²³⁶ One potential difficulty with team-led blogs are where various team members run the blog and there is not a clear delineation of authorship.²³⁷ Arguably, such a blog could be considered a joint work, rather than a work made for hire.²³⁸ However, the purpose of a joint work is that the two contributions are merged into a single work. Because the

²³⁰ See *Help: Serial Issues*, *supra* note 215.

²³¹ The Copyright Act of 1976, 17 U.S.C. § 201(b) (1978); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *U.S. Auto Parts v. Parts Geek, LLC*, 692 F.3d 1009 (9th Cir. 2012).

²³² Andrew Stockment, *Copyrights and Works Made for Hire*, AMERICAN BAR ASSOCIATION (Aug. 9, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/intellectual-property/copyrights_and_works_made_hire/.

²³³ *Id.*

²³⁴ See *U.S. Copyright Office Circular 9* (2012), <https://www.copyright.gov/circs/circ09.pdf>.

²³⁵ See generally *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013) (holding that because the work did only come into existence upon the request of the employer, it was a work made for hire). It is important to note that this case was decided under the 1909 Copyright Act, but that is relevant only as to the termination right issue in this case.

²³⁶ The Copyright Act considers employed newspaper columnists’ articles works made for hire, but excludes freelancers. See *U.S. Copyright Office Circular 9*, *supra* note 234. A method for bloggers to combat the exclusion of freelancers would be for bloggers to have the freelancer transfer the copyright to the blogger for that work. See *id.*

²³⁷ For *A Cup of Jo*, the Joanna Goddard is the face of the blog, but has a well-known team of contributing writers. Each contributing writer gets a by-line. See Brooke Barker, *Making New Friends*, A CUP OF JO (Nov. 9, 2018, 11:42 AM), <https://cupofjo.com/2018/11/sad-animal-facts-comic-new-friends/>. This structure of content is more similar to a magazine, where each article is part of a single publication, which collectively receives protection for the content contained in its pages.

²³⁸ 17 U.S.C. § 101 (“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”). As a note against joint work designation, team-based blogs will likely register their content under the company’s name. See *U.S. Copyright Office, Circular 1* (2017), <https://www.copyright.gov/circs/circ01.pdf>. Therefore, rights to posts on *A Beautiful Mess* would be transferred to the company. See *id.* This would mirror production companies’ ownership of rights to shows, movies, et cetera. See *id.* Further, the works could be a work made for hire. See *U.S. Copyright Office Circular 9*, *supra* note 234.

work of contributing writers is published with attribution to the post's writer, it seems unrealistic that such a post is meant to be merged into the whole, despite the post being published by *A Beautiful Mess*. Such an arrangement seems to fall be more analogous to a magazine, where individual authors receive a bi-line, but are part of a larger publication (aka a collective work). Another concern is when some employees perform services for the blog but do not create content. This is seen with the example of *A Beautiful Mess*, which has two main faces of the blog, but has various employees working on different aspects of the business, many of whom never contribute posts or other purely creative content.²³⁹

However, individual bloggers, without employees, have greater difficulty satisfying the work made for hire requirement because a work made for hire inherently requires two parties: the employer requesting the work and the employee who performs the work.²⁴⁰ In the blogging realm, this requires a blogger requesting the creation of content and an employee who creates the content at the direction of the blogger. Bloggers who do not have any employees may not have agreements in place with people they do hire for content creation: photographers, guest writers, et cetera. While a lack of employer-employee relationship gives pause, works may still be considered a work made for hire even if created by an independent contractor.²⁴¹ Such an arrangement falls within the "specially commissioned work" section of the statutory definition of work made for hire.²⁴² To fall into this category, the work must be of a certain type, including a contribution to a collective work.²⁴³ Therefore, if blogs are considered collective works under the second requirement for serial works, this may alleviate concerns regarding whether or not content is a work made for hire. Still, this factor, like the second, illuminates how individual bloggers are disadvantaged when registering their blogs because the language of the statute does not adequately accommodate advances in technology and the way people consume creative content.

The fourth requirement, that the author and claimant must be the same person or organization for all the issues, seems easily satisfied.²⁴⁴ A majority of blogs are run by a single person, which leads to the blogger either being the business's

²³⁹ Here, not "purely" creative content can encompass assistants, social media managers, who do not produce content, but manage it, and other similar positions.

²⁴⁰ Litigation over works made for hire have two parties, the employee claiming copyright ownership and the employer, who claims ownership because the work was a work made for hire. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 730 (1989); *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 552 (2d Cir. 1995); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994).

²⁴¹ *See* *Stockment*, *supra* note 232.

²⁴² 17 U.S.C. § 101.

²⁴³ *Id.*

²⁴⁴ *See Help: Serial Issues*, *supra* note 215.

leader or is solely the business.²⁴⁵ Consequently, when a blogger registers her posts, she would be the author and claimant for all issues.

The fifth requirement, that the serial work is published at intervals of one week or longer, poses a challenge.²⁴⁶ Bloggers may not satisfy this requirement, given many bloggers publish posts each day of the week or on a regimented schedule of multiple days.²⁴⁷ However, daily newspapers are eligible for serial protection, despite being published at daily intervals.²⁴⁸ Thus, bloggers who post more frequently than one-week intervals should not have serial protection thwarted.

The sixth requirement for serial classification is that all issues within the group must be published within a three-month period.²⁴⁹ Bloggers could satisfy this depending on how they categorize their posts. The nature of a blog is that it covers various topics and it is effectively an online magazine.²⁵⁰ Therefore, bloggers could group their posts into issues based on a variety of posts (one lifestyle post, one fashion post, and one advice post) or based on date of publication (all posts published during the three-month period).²⁵¹ If bloggers wanted to group posts based on topics and register each topic as separate issues, they could.²⁵² Further, if they grouped posts by date, the requirement is satisfied.²⁵³ The issues would then be registered as a group, so long as the dates fall within the three-month period.²⁵⁴

The seventh requirement is that each issue must be created no more than one year before the publication of the issue.²⁵⁵ This raises a timing concern for bloggers. Depending on how they group issues, the dates of each blog post would need to satisfy the one-year requirement.²⁵⁶

²⁴⁵ Within the blogging community, there seems to be a clear distinction between individually run blogs and team run blogs. However, team run blogs have a greater chance of receiving more effective protection than individually run blogs because of the semantics of the statute. The distinction between blog types is seen on sites like Bloglovin', a blog-following website, which lists Emily Schuman of *Cupcakes and Cashmere*, Joy Wilson of *Joy The Baker*, and Aimee Song of *Song of Style* as top blogs within the platform. See Bloglovin', <https://www.bloglovin.com/blogs> (last visited Jan. 27, 2018). Further, *A Beautiful Mess*, *Cup of Jo*, and *WhoWhatWear* are listed as top team-run blogs. See *id.*

²⁴⁶ See *Help: Serial Issues*, *supra* note 215.

²⁴⁷ See, e.g., *A BEAUTIFUL MESS*, *supra* note 228.

²⁴⁸ See U.S. COPYRIGHT OFF., *Help: Group Registration of Newspaper Issues*, COPYRIGHT.GOV, <https://www.copyright.gov/eco/help-newspapers.html>.

²⁴⁹ See *Help: Serial Issues*, *supra* note 215.

²⁵⁰ See, e.g., *THE STYLE SCRIBE*, <https://thestylescribe.com/> (last visited Feb. 15, 2018); *A CUP OF JO*, <https://cupofjo.com/> (last visited Feb. 15, 2018); *A BEAUTIFUL MESS*, <https://abeautifulmess.com/> (last visited Feb. 15, 2018) (showing two blogs that have different categories of content, different web pages for specific content a viewer may look for, and various articles (aka blog posts)).

²⁵¹ See, e.g., *Blog Post Planning Marker Board*, *A BEAUTIFUL MESS*, *supra* note 215 (explaining the content schedule the team follows).

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ See *Help: Serial Issues*, *supra* note 215.

²⁵⁵ See *id.*

²⁵⁶ See, e.g., *Blog Post Planning Marker Board*, *A BEAUTIFUL MESS*, *supra* note 213 (outlining a blog's content schedule).

The eighth requirement, that all issues in the group must be published within the same calendar year, would be satisfied if the blogger grouped posts based on their publication date.²⁵⁷ The final requirement is that each group contain two or more issues. If a single blog post is considered an issue, a blogger would likely satisfy that at least two issues be included in each group registration.²⁵⁸ However, even if bloggers group several blog posts into a single issue, more than two issues would likely be included in the group registration.²⁵⁹ This requirement raises the question of what constitutes an issue for bloggers, but regardless of how issues are compiled, bloggers will likely have enough issues to satisfy the two-issue requirement.²⁶⁰

Under the Act, serial works are historically limited to “periodicals, newspapers, magazines, bulletins, newsletters, annuals, journals, proceedings of societies, and other similar works.”²⁶¹ The categories for serial work protection is outdated, as they do not reflect advances in technology.²⁶² Recognition of magazines, but not blogs, as serial works is an archaic approach from a legal perspective. Historically, printed publications regularly forego print today, preferring an online medium, and the failure of copyright law to acknowledge such changes in technology leads to inadequate protection.²⁶³ Similarly, what constitutes a newspaper is confused by the arrival of online-only news, such as *Huffington Post*.²⁶⁴ Online publications similar to *Huffington Post* are considered the digital equivalent to newspapers and should gain protection as serial works. Still, through a representative, the Copyright Office declared that blogs do not qualify as serial works because they are “electronic journals published one article at a time,” and

²⁵⁷ See *Help: Serial Issues*, *supra* note 215.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See, e.g., *Blog Post Planning Marker Board*, A BEAUTIFUL MESS, *supra* note 213 (outlining a blog’s content schedule).

²⁶¹ See HOYT L. BARBER & ROBERT M. LOGAN, PROTECT YOUR INTELLECTUAL PROPERTY: AN INTERNATIONAL GUIDE TO PATENTS, COPYRIGHTS AND TRADEMARKS 12 (2013).

²⁶² See *infra* note 263 and accompanying text.

²⁶³ See, e.g., Maria Bobila, ‘Nylon’ Goes Digital-Only, *Folds Print Publication [Updated]*, FASHIONISTA (Sept. 7, 2017), <https://fashionista.com/2017/09/nylon-magazine-shutters-print-edition> (signaling the end of *Nylon* magazine’s print edition as the magazine moved online, allowing Nylon Media Inc. to focus on social media and its digital content); Keith J. Kelly, *There Will No Longer Be a Print Version of Men’s Fitness*, NEW YORK POST (Aug. 11, 2017, 10:04 AM), <http://nypost.com/2017/08/11/there-will-no-longer-be-a-print-version-of-mens-fitness/> (publicizing *Men’s Fitness* ended its print edition and kept the magazine exclusively online); Gabriella Paiella, *Self Magazine’s Print Edition is Shutting Down*, THE CUT (Dec. 1, 2016, 10:17 AM), <https://www.thecut.com/2016/12/self-magazine-print-edition-is-shutting-down.html> (announcing *Self* magazine ended its print edition, and moved the magazine online).

²⁶⁴ *Huffington Post*, an exclusively online news site with the tagline “The Internet Newspaper,” won a Pulitzer Prize in 2012, a prize exclusively reserved to print newspapers until 2008. Will Oremus, *Is The Huffington Post a Newspaper?*, SLATE.COM (Apr. 18, 2012), http://www.slate.com/articles/news_and_politics/explainer/2012/04/the_huffington_post_won_a_pulitzer_does_that_mean_it_s_a_newspaper_.html. Now, however, the Prize is open to “online news sites,” indicating the traditional meaning of “newspaper” is expanding to include online newspapers. *Id.*

therefore fail as collective works.²⁶⁵ However, if online-only news is the equivalent of newspapers, blogs are increasingly, if not already, the digital equivalent of magazines. Therefore, blogs should be afforded the same registration method as magazines and qualify for serial registration.

It is important to recognize serial registration is a complicated solution to a relatively simple issue.²⁶⁶ This Article attempts to apply the current statute to the blogging community, which requires bending the language to accommodate the gap between the Act's language and current technology.²⁶⁷ Accordingly, this is a judicial solution to a problem that may be more efficiently solved through future legislation.²⁶⁸

IV. THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

A significant problem to blogs and their accompanying social media not being adequately covered by the Copyright Act is the application of safe harbors under the Digital Millennium Copyright Act (DMCA).²⁶⁹ The rapid growth and prevalence of social media led Congress to take steps to alleviate copyright concerns for copyright owners and social media users.²⁷⁰ One such measure is the DMCA, which Congress passed in 1998 as part of the Copyright Act with the intention of protecting “copyright holders against digital piracy” of their copyrighted material.²⁷¹ The need for the DMCA arose when copyright holders anticipated that the rise of user-generated content on Internet websites would lead to rampant copyright infringement.²⁷²

The DMCA treats online service providers (OSP) as “innocent middle-men” in disputes between copyright holders and an infringing user of the OSP.²⁷³ Thus, the DMCA effectively creates “safe-harbors”²⁷⁴ for OSPs to escape liability if the OSP removes the content timely or blocks access to the content.²⁷⁵ However, the

²⁶⁵ United States Copyright Office, *Circular 66: Copyright Registration of Websites and Website Content* (Oct. 17, 2018), <http://www.copyright.gov/circs/circ66.pdf>. It is likely the Copyright Office did not address the other factors because it claims blogs fail the first factor (that is, they are not collective works). *See id.*

²⁶⁶ *See supra* Part III(A). *supra* footnote 1

²⁶⁷ *See id.*

²⁶⁸ To make the current statute effectively applicable to bloggers, a more liberal interpretation of the statutory language is required. *See id.*

²⁶⁹ *See supra* Part III(B).

²⁷⁰ Jaqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability*, 62 WASH & LEE L. REV. 487, 490 (2005).

²⁷¹ *See id.*

²⁷² Mitchell Zimmerman, *Your DMCA Safe Harbor Questions Answered*, Fenwick & West LLP (2017) (available at <https://www.fenwick.com/FenwickDocuments/DMCA-QA.pdf>).

²⁷³ *Id.*

²⁷⁴ 17 U.S.C. § 512 (2017).

²⁷⁵ Zimmerman, *supra* note 272, at 1.

copyright holder is responsible for catching the copyright infringement and then reporting the infringement to the OSP.²⁷⁶

Within the DMCA, there are four types of safe harbors: storage,²⁷⁷ transmission,²⁷⁸ caching,²⁷⁹ and information location tools.²⁸⁰ Safe harbors protect social media sites from copyright infringement suits, so rather than the site being sued for infringement, they are a neutral middle party between the copyright holder (that is, the blogger) and the user (that is, another social media user who posts infringing material to their individual account).²⁸¹ Instagram, Twitter, and YouTube are all social media websites protected by DMCA safe harbors, thus the responsibility of catching copyright infringement within those sites falls on the copyright holders (bloggers, for example).²⁸² There is an exception, however: if the OSP engages,²⁸³ whether deliberately or inadvertently, in copyright infringement, the safe harbor will not prevent liability.²⁸⁴ While some cases²⁸⁵ held that social media sites may be held liable for “inducing infringement by its users,” if the site has a system that brings it under a DMCA safe harbor, liability for the website is often non-existent.²⁸⁶

Safe harbors are dangerous to bloggers’ businesses because a blogger is responsible for first catching copyright infringement, then reporting it, and then waiting for the OSP to remove the infringing material.²⁸⁷ Exacerbating this concern, some social media sites are better than others at handling infringement notices, which leads to inconsistent take down policies.²⁸⁸ The result of such

²⁷⁶ *Id.*

²⁷⁷ The Storage safe harbor means that the OSP “hosted, stored, and made infringing matter available if it was stored at the direction of users.” See Zimmerman, *supra* note 272 at 5 (explaining 17 U.S.C. § 512(c)).

²⁷⁸ The Transmission safe harbor applies to OSPs who “transmitted, routed or provided connections for digital online connections for infringing material transmitted by users.” See *id.* (explaining § 512(a)).

²⁷⁹ The Caching safe harbor is triggered when OSPs “cached infringing material on a system or network, when the material was initially made available by someone else.” See *id.* (explaining § 512(b)).

²⁸⁰ The Information Location Tools safe harbor is when OSPs “provided links or referred users to online locations containing infringing matter or activity.” See *id.* (explaining § 512(d)).

²⁸¹ See Zimmerman, *supra* note 272, at 5.

²⁸² Nicole Martinez, *DMCA Safe Harbor: Why Artists Can’t Sue Instagram*, *DMCA Safe Harbor: Why Artists Can’t Sue Instagram*, ART LAW J., 3 (Feb. 7, 2016), <https://artlawjournal.com/dmca-safe-harbor-sue-instagram/>.

²⁸³ Engages, in this context, means the OSP’s business causes infringement. See Zimmerman, *supra* note 272. Further, an OSP is liable if it acts in concert with users to infringe. *Id.*

²⁸⁴ *Id.*

²⁸⁵ The cases examined were not social media cases, but the Supreme Court’s logic is transferable to the social media context. See Doft, *supra* note 186, at 977 (citing *Metro-Goldwyn-Meyer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

²⁸⁶ *Id.* (citing 17 U.S.C. § 512(c) (2016)).

²⁸⁷ *Id.* (explaining safe harbors are not liable for infringing material posted to their sites, but should remove material that is reported and the OSP finds to be damaging).

²⁸⁸ See *e.g., id.* at 988-89 (arguing that “Twitter’s response to takedown requests has been sporadic ... [and] non-uniform application of Twitter’s policies is concerning”).

inconsistency in take down effectiveness can negatively impact the profitability of bloggers' businesses.²⁸⁹ When a blogger decides to share her blog content on social media, the potential for copyright infringement doubles.²⁹⁰ Not only must she police whether her blog post is being infringed upon, she must also consider whether users are infringing upon the social media posts.²⁹¹ Rather than being able to efficiently run her business, the blogger is also responsible for policing social media to ensure her content is not being misappropriated.²⁹²

If the Copyright Act were amended to allow bloggers to register their blogs as serial works, and in turn allow such registration to extend to their social media channels, the potential danger safe harbors pose would be minimized.²⁹³ For example, rather than the blogger reporting the infringement to the social media site, the blogger could enforce her registered copyright protection directly against the infringer.²⁹⁴ Additionally, the concern with inadequate, inconsistent takedown procedures would decrease because bloggers could move forward with a copyright claim without having to rely solely on the takedown procedures of the third party site.²⁹⁵ To prevent the infringing material from remaining on the site, the blogger will still request a takedown, but they can take action without having to rely solely on third party procedures or wait around for the infringing material to be removed.²⁹⁶

Further, because bloggers are currently responsible for monitoring social media sites for infringement, allowing bloggers to apply the registration of their blog to their social media content is reasonable.²⁹⁷ If bloggers could assert protection of

²⁸⁹ See *id.* (explaining social media sites are slow to respond to takedown requests until suit is filed, leaving infringing material on their sites for extended periods).

²⁹⁰ See *e.g.*, Julia Engel, *2017 Year End Review*, GAL MEETS GLAM (Dec. 29, 2017), <http://galmeetsglam.com/2017/12/2017-year-end-review/> (featuring a photo under "February" that is also posted on Instagram); Julia Engel (@juliaengel), INSTAGRAM (Jan. 22, 2018), <https://www.instagram.com/p/BeRVGkDFmEs/?hl=en&taken-by=juliaengel>.

²⁹¹ See *e.g.*, Doft, *supra* note 186, at 988 (referring to a Twitter example on how Twitter handled a takedown notice).

²⁹² Inappropriate sharing is stealing in which users take credit for the text, photo, or video from the blogger. See *supra* Part II. On Instagram, Josie Fear, of *Fashion Mumblr*, expressed outrage when an account posted her videos and content, attempting to share the content as its own. See Josie Fear (@Josieldn), *Instagram Story*, INSTAGRAM (Oct. 27, 2017) (on file with author). Fear told her followers that "when you work [hard] to create original content and then it gets ripped off like this, it makes [you] a little frustrated." *Id.* Naturally, infringement at this level is upsetting for professionals whose blogs are their self-grown business. *Id.* However, it is notable that Fear's remedy in this situation was to report the false account to Instagram, and to encourage her followers to do the same. *Id.* Fear reasonably believed that the more reports Instagram received, the faster the account would be removed from the app. *Id.*

²⁹³ See *supra* Part III(A)(a).

²⁹⁴ See Natalie Mootz, *Blogger's Guide to Copyright and DMCA*, BLOGGING.COM, <https://blogging.com/copyright-dmca/> (explaining that bloggers should notify the offending party of potential copyright infringement, but if the offending party denies infringement, bloggers must rely on a takedown notice).

²⁹⁵ See Doft, *supra* note 186, at 988-89.

²⁹⁶ See *id.*

²⁹⁷ See *supra* Part III(A).

their social media content through the registration of their blogs as serial works, they would continue to regulate social media for infringing material, but would have greater enforcement power when they discover infringing material.²⁹⁸ Nonetheless, the burden of monitoring social media for possible infringement would remain on the blogger.²⁹⁹

In copyright infringement cases, an affirmative defense against a claim of infringement is the fair use doctrine.³⁰⁰ The fair use doctrine allows the use of copyrighted material even without the permission of the owner.³⁰¹ Under the fair use doctrine, the “use of a copyrighted work ‘for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research,’ is not copyright infringement.”³⁰² In order to determine whether the fair use doctrine applies to a work, courts apply a four-factor test, weighing:

(1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁰³

Considering many social media users offer their own commentary on current events, celebrity faux pas, and blogger posts, if users are accused of copyright infringement, users may argue that fair use should apply as they are merely commenting on the issue.³⁰⁴ It is unclear whether social media sites weigh the four factors that courts weigh when they receive a takedown request.³⁰⁵ Despite the fact that the fair use doctrine will likely only be evaluated once the copyright holder sues the infringer and the infringer raises a fair use defense,³⁰⁶ fair use may lead to a more difficult battle for bloggers seeking protection of their blogs’ material.³⁰⁷

²⁹⁸ *See id.*

²⁹⁹ Under the current Copyright Act and the DMCA, the blogger is responsible for detecting infringing material because social media sites are safe harbors. *See Zimmerman, supra* note 272. Granting greater ability for the blogger to enforce copyright rights would justify the cost of leaving monitoring to the blogger. *See Jessi Fearon, Was Your Blog Content Stolen? Here’s What to Do Next ...*, JESS FEARON (Apr. 15, 2016), <https://jessifearon.com/2016/04/blog-content-stolen-heres-what-to-do-next.html> (explaining the repercussions of stolen blog content and recourses for bloggers whose content is stolen).

³⁰⁰ *See* Doft, *supra* note 186, at 974.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *See id.* (citing 17 U.S.C. § 107 (2016)).

³⁰⁴ *See id.*

³⁰⁵ *See* Doft, *supra* note 186, at 976-77.

³⁰⁶ *Id.* at 976.

³⁰⁷ *See, e.g., id.* at 972 (stating that copyright infringement remains prevalent on social media sites).

CONCLUSION

Social media offers interconnectedness and presents a 360-degree view of a blogger's brand.³⁰⁸ The benefit of interconnectedness comes at the cost of adequate copyright protection for entrepreneurs, such as bloggers, whose ability to succeed is firmly rooted in their ability to promulgate original, creative content.³⁰⁹ Bloggers are an integral part of businesses in the digital age and should be afforded greater copyright protection in their creative content, which is the soul of their businesses.³¹⁰ The current Copyright Act fails to provide adequate protection to bloggers' content.³¹¹ One issue lies in the reliance on third parties, such as Instagram, Twitter, or YouTube, to remove infringing material.³¹² The issue of takedown policies remains heightened because bloggers are responsible for noticing infringement, reporting it, and then waiting for the OSP to takedown the infringing material.³¹³

Bloggers create content on a high-volume basis, posting new content weekly or daily (with some bloggers sharing multiple posts each day of the week).³¹⁴ As such, bloggers have a plethora of content that they must ensure is not stolen by internet or social media users because the success of their businesses remains at risk when their content is stolen.³¹⁵ Under the current framework of the Copyright Act, bloggers can gain greater protection if their content is considered a serial work and may be registered as such.³¹⁶ Allowing registration of blogs as serial works would alleviate registration tediousness and expedite bloggers' ability to protect their content.³¹⁷ Further, allowing efficiency in registration would enable bloggers to protect their content better because they could rely less on takedown procedures and enforce their copyrights more effectively.³¹⁸

Under the current system, bloggers are at the mercy of social media sites' inconsistent takedown policies, which harms their business and impacts their

³⁰⁸ See Heitlinger, *supra* note 61 (referring to the 360 degree view as adding additional value to one's overall brand).

³⁰⁹ See *supra* Part II and III.

³¹⁰ See, e.g., Khoung, *supra* note 138, at 129 (maintaining relationships with social media accounts allows companies to leverage social media users' opinions to advertise products).

³¹¹ Lipton, *supra* note 270, at 531.

³¹² See Martinez, *supra* note 282 (placing more responsibility on the copyright holder).

³¹³ *Id.*

³¹⁴ See, e.g., Heitlinger, *supra* note 61 (showing an example of a blogging schedule).

³¹⁵ See, e.g., Hines, *supra* note 135 (stating that Copyscape is one way for bloggers to confront content scrapers).

³¹⁶ See, e.g., U.S. Copyright Office, *supra* note 207-208, (listing the current requirements for a work to be considered a serial work).

³¹⁷ See *id.* (describing the registration requirements for serial works).

³¹⁸ See *supra* Part II and III (explaining the need for efficiency to protect blogger's content).

ability to seek effective recourse when infringement occurs.³¹⁹ Because of the DMCA, social media sites are safe harbors that may escape liability when users post infringing content.³²⁰ Working with the DMCA, bloggers may continue to report infringing material so the OSP will take down the material, which bloggers cannot do.³²¹ Social media sites should improve the consistency and timeline of their takedown procedures to better protect their users.³²² If social media sites improved takedown procedures, bloggers could conduct their businesses the assurance that infringing content will remain on the site for extended periods.³²³ If there is any concern as to why bloggers should be afforded more effective copyright protection, we can look to the regulation of bloggers' by bodies like the FTC. Implicit in the regulation of the blogging industry is the recognition that bloggers conduct legitimate businesses. Therefore, if the FTC recognizes bloggers as influential business people, the Copyright Act should afford better protection to those businesses, which are rooted on bloggers' ability to generate copyrightable works.

³¹⁹ *See, e.g.*, Doft, *supra* note 186, at 988- 92 (comparing YouTube's policy to other social media websites).

³²⁰ *Id.*

³²¹ *See, e.g., id.* at 988 (allowing a freelance writer to file a DMCA takedown request with Twitter).

³²² *See, e.g., id.* (comparing one case where Twitter responded within 48 hours and another case where Twitter failed to respond until a suit was filed).

³²³ *Id.* (stating that a photographer suing Twitter originally sent Twitter 28 takedown requests before filing suit).
